

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TOD KEVIN HOUTHOOFD, a/k/a TODD
KEVIN HOUTHOOFD,

Defendant-Appellant.

UNPUBLISHED
December 2, 2010

No. 269505
Saginaw Circuit Court
LC No. 02-021097-FH;
04-024765-FH;
05-025865-FH

ON REMAND

Before: BECKERING, P.J., and O'CONNELL and BORRELLO, JJ.

O'CONNELL, J. (*concurring in part and dissenting in part*).

I concur with the majority's determination that the trial court correctly identified objective and verifiable factors to support the departure sentence, i.e., that defendant posed a dangerous threat of violent retribution to specific persons. I respectfully dissent from the majority's conclusion that the trial court abused its discretion in imposing the particular sentence. In my view, the court was well within its discretion in specifying a 40 year minimum sentence for defendant's solicitation of the murder of an innocent shopkeeper. The record amply demonstrates the trial court's determination that 40 years was the length of time necessary to protect the specified targets from defendant's vengeance, and that the specific sentence was proportionate to the seriousness of defendant's conduct under *People v Smith*, 482 Mich 292; 754 NW2d 284 (2008).

At sentencing, the experienced and learned trial court judge explained why the sentence was proportionate to this offense and this defendant. When asked by the prosecutor to confirm whether the length of the sentence was based upon substantial and compelling reasons, the trial court responded definitively:

Mr. Patrick Duggan [the prosecutor]: Your Honor, are the reasons you gave before the sentence the ones that you would count as substantial and compelling reasons for guidelines exceeding if that's the case?

The court: I don't know how they could get any more substantial and compelling.

Mr. Duggan: You didn't say the magic words. I wanted to make sure. Thank you.

The majority now finds that the trial court failed to explain the degree of departure and remands for re-sentencing because the trial court did not use "magic words" regarding the proportionality of the sentence. This outcome is inconsistent with our Supreme Court's directive in *Smith*, 482 Mich at 311: "We do not suggest that trial courts must sentence defendants with mathematical certainty. Nor are any precise words necessary for them to justify a particular departure." Further, the *Smith* Court explained that reversal is required when "the connection between the reasons given for departure and the extent of the departure are unclear." *Id.* at 304.

Here, the record demonstrates the clear connection between the reasons for the departure and the extent of the departure. At sentencing, rather than performing the rote recitation that the sentence is proportionate to the seriousness of defendant's conduct, the trial court provided two specific references to illustrate the reason for a minimum 40-year sentence. First, the trial court acknowledged that defendant's conduct caused lifetime fear to his specified targets and to their families: "It's got to be very difficult for somebody to think about whether they'll be alive tomorrow, whether their family is going to be in danger for the rest of their days." Second, the trial court succinctly described defendant's inability to forget or forgive his grudges: "a person who would go to the lengths that the evidence showed that you did, unless you get a lobotomy . . . if you attempted this once and you attempted to have somebody kill the victim in the tractor case, and you also said, you know, go do Ms. Meagher, too"

The sentencing record demonstrates that the trial court's reference to a lobotomy was not pure hyperbole; rather, it was the court's pithy idiom clarifying the basis for the extent of the departure. When defendant appeared before the trial court for sentencing, he was aged 47. The 126-month guideline sentence would allow defendant's release before age 60. In contrast, the 40-year term would keep defendant in prison until nearly age 90. In my view, the record conveys the court's determination that adding 30 years to the guideline term would serve the dual purpose of allowing defendant's intended victims to live their lives free from the fear of defendant's vindictiveness, while reducing the likelihood that defendant would be able to carry out his threats upon his release. The trial court thereby recognized the concern described by the experienced state police detective at sentencing:

. . . I'm going to tell you the danger that I felt in my life and the danger that was conveyed to me by the victims, and there are other victims that he has not been convicted of. And I understand . . . that he'll never be convicted of those. . . .

He will never be convicted, therefore, it should never even be considered. But I will tell you what I've been through and my family. At this point, my family and I are going to move. We are going to hide our residence every way I possibly can because I've learned in this case just how much danger somebody like him can pose and just how much can happen to a family, what can happen by the simple phone call

I'm still convinced to this day, Your Honor, that he's not done. . . .

* * *

. . . . I'm still convinced that [defendant] knows where I live. To this day he knows where I live, and I'm convinced that he's not done. I still live in fear. . . . It's a tough battle to have to look over your shoulder on a constant basis to wonder if you're going to get sniped by whoever he may hire or whoever he may get to do his bidding.

* * *

What I'm asking from Your Honor is that you exceed the guidelines and sentence [defendant] to the maximum sentence that you feel justified that will give my family a chance to basically go into hiding and start a different life

I have worked gangs for a lot of years. I have met some very dangerous people. But I will tell you and I would go under oath in front of Your Honor to say in 19 years I have never met a more dangerous man than that man right there

Even if the sentencing excerpts were insufficient to demonstrate that the trial court was within its discretion, I believe the controlling standard of review requires this Court to be mindful of the trial court's grasp of the trial evidence.¹ That evidence contains ample support for the trial court's decision. The trial transcript depicts a series of vengeful acts spanning at least eight years, including a violent attack upon a victim, with a subsequent attack on the same victim three years later. The evidence indicates that defendant was not merely engaging in impulsive angry acts, but in planned vendettas against multiple victims, including his estranged wife, his co-workers, a law enforcement official, and a witness. Moreover, after trial, the trial court placed the jurors' information under seal, noting jurors' safety concerns and stating, "[t]he evidence this court has heard . . . paints a sinister picture of defendant . . . as a man who lacks the capacity to either forgive or forget any perceived wrong."

I recognize that upward departures from the sentencing guidelines are appropriate "only in exceptional cases." *People v Fields*, 448 Mich 58, 68; 528 NW2d 176 (1995). This case is clearly one of those exceptional cases.² To reverse this sentence is to elevate "magic words"

¹ The deferential standard is particularly appropriate here, given that the trial court issued defendant's sentence prior to our Supreme Court's elucidation in *Smith*, 482 Mich at 303-317.

² The trial court clearly articulated that defendant has a long history of retribution against specific individuals, including the use of bombs, threats, intimidation and solicitation of murder. The trial court further noted, in very precise and colorful language, that short of a lobotomy there is no hope of rehabilitating defendant. Moreover, the trial court expressed agreement with the police detective's allocution, in which the detective requested that the court "exceed the guidelines and sentence [defendant] to the maximum sentence . . . that will give my family a chance to basically go into hiding and start a different life." It is very clear that the trial court

over the long-standing wisdom of deferring to the trial court's understanding of the record. I would affirm the sentence.

/s/ Peter D. O'Connell

placed this defendant in the category of the most dangerous to society, and the court specifically fashioned a sentence that is proportional to this defendant's offenses. The majority opinion remands this case to require the trial court to use more precise language. I am not sure that any trial court could be more precise in describing the need for the extent of the departure.